License Agreements relating to IP Rights and the EC Regulation on Jurisdiction

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There is a need for accurate and timely information in Australia. In the 2007-2008 financial year, the Australian Bureau of Statistics reported that 6.9% of the population had accessed the internet for the first time that year. This highlights the importance of reliable information sources.

According to the Australian Information Network (AIN), which is a part of the Australian Government, there are over 25 million internet users in Australia. This number is expected to increase in the coming years due to the increasing use of social media and online services.

The Australian Bureau of Statistics (ABS) maintains a database of statistical information, which is accessible to the public. This database includes data on various aspects of Australian society, such as demographics, economy, and health.

In conclusion, accurate and timely information is crucial for the development and growth of any country. The Australian Government is committed to providing accurate and reliable information to its citizens.

characterizing license agreements relating to IP rights as general contracts, according to Art. 51(b) but not Art. 51(a). The relevant obligation (but not the characteristic agreement by the place of performance) is created by the provision of the services. The permission given by Art. 51(a) is therefore not classified under the relevant jurisdiction.

The first argument relies on the ECJ's interpretation of Art. 51(a). However, the relevant provision in the ECJ's decision was Art. 51(b). In the case of the latter article, the ECJ referred to the Directive and not to the Article itself. Therefore, the latter provision was not considered in the relevant decision. This is why the ECJ in the Falco case is suggested by a historic and systematic analysis of the provision of Art. 51(b) of the Brussels Regulation. The interpretation of the Court of Justice in the Falco case should be based on the principle of the freedom of establishment of the services. The permission given by Art. 51(a) is therefore not classified under the relevant jurisdiction. The other arguments presented in the European Union case law are also considered to be invalid.

Finally, the ECJ's judgment in the Falco case is supported by an additional argument. As mentioned above, Art. 51(b) of the Brussels Regulation was initially introduced for the purpose of harmonizing national law with the ECJ's decision in the Falco case. The aim was to ensure a uniform interpretation of the relevant provision of the Brussels Regulation in all Member States. However, the additional argument presented by the ECJ in the Falco case is not supported by any other legal principles or rules. Therefore, it is not considered a valid argument in the relevant jurisdiction.

The second argument relies on the structure and effects of the relevant provision of the Brussels Regulation. The relevant provision of the Brussels Regulation is Art. 51(b). This provision concerns the concept of contracts for the provision of services. The relevant provision states that the contract is concluded with the person named in the provision as the person who is to be contracted. Therefore, the relevant provision should be interpreted as a contract, not as a license agreement. This is why the Falco case is suggested by a historic and systematic analysis of the provision of Art. 51(b) of the Brussels Regulation.
contracts, the licensor undertakes not to challenge the use of his IP right by the licensee, but does not have to perform any particular activity. Thus, this assumption was considered by the ECJ in the Falco decision as the only relevant element to preclude characterizing licence agreements on IP rights as contracts for the provision of services. By contrast, in licence agreements that are structured like sales contracts, it is possible to state that the licence agreements have the “constitutive” effects of an absolute “right to exercise the licensed IP right, the former of which is dependent on the licensor’s IP right that has been licensed” (rather than an obligation of the licensor not to challenge the use of his IP right by the licensee). 79 (ii) The ruling in the ECJ Falco decision seems only to have been based on licence agreements relating to IP rights that are structured like letting contracts, which as such constitute a licensee’s legal position that cannot be assimilated into a (partial) absolute right, but rather lies in a (principal) obligation of the licensor not to challenge the licensee’s use of his IP right. Thus, with regard to this latter contractual construction, the ECJ decision Falco seems to be correct. (iii) On the other hand, the situation is different with respect to contracts that, according to the lex causae, are structured like sales agreements. Thus, in such cases, the exclusion of the jurisdiction rule in contracts for the provision of services immediately seems to be reasonable a fortiori. Indeed it remains to be asked whether the licence agreements relating to IP rights considered here should be classified as contracts for the sale of goods within the meaning of Art. 5(1)(b), first indent, of the Brussels I Regulation, according to which “a person domiciled in a Member State may, in another Member State, be sued [...] in the case of the sale of goods” in the “Member State where, under the contract, the goods were delivered or should have been delivered”. One opinion answers this question in the affirmative, 80 by relying on two different arguments. The first relies on a systematic, evolutionary interpretation of the Brussels I and Rome I Regulations, whereby the latter “rendered totally superfluous the requirement of the ‘tangibility’ of the goods in the sale of goods agreement” concluded with consumers, a result that “is certainly able to reflect itself in the notion of ‘sale of goods’ ex Art. 5 of the Brussels I Regulation”. 81 The second argument invoked by the author in question relies on opportunity reasons. Hence, for agreements on the sale of goods, the Rome I Regulation determines the lex contractus as that of the State where the party that undertakes the characteristic obligation has his habitual residence, whereas the Brussels I Regulation establishes jurisdiction in the State where the characteristic obligation was performed or should 79 T. ASCARELLI, “Teoria della concorrenza e dei beni immateriali” 386 (Giuffrè, Milan, 3rd ed., 1960). See also P. AUTERI, “Territorialità del diritto di mercato e circolazione di prodotti ‘originali’” 297 (Giuffrè, Milan, 1973). For the Swiss and German legal systems, see R. HELLY, “Lizenzertragsrecht” 8 (Stämpfli, Berne 2001); G. HEINZ, “Patent- und Know-how-Lizenzvertrag”, para. 65 (Müller, Heidelberg, 5th ed., 2003); G. SCHNEIDER, “Urheberrechts-Komentar” 593 (Beck, Munich, 3rd ed., 2006). 80 See N. ROSCHIERO, “I contratti”, op. cit., at 520. 81 Ibidem. have been performed. “[I]n case of simple IP rights licence agreements these two places generally [...] coincide, since the transfer of the IP right usually takes place in the State where the licensor has his residence”. 82 Consequently, the inclusion of “simple” licence agreements relating to IP rights in the category of the sale of goods pursuant to Art. 5(1)(b), first indent, would constitute “a perfect connection between forum and jus, with all the related advantages that this connection implies”. (iv) However, this is not the prevailing opinion. According to the latter, Art. 5(1)(b), first indent, of the Brussels I Regulation only applies to the sale of tangible goods or assets and therefore does not encompass contracts that transfer IP rights or constitute (partial) absolute rights on the transferred IP rights. 83 This prevailing opinion relies on several arguments. The first is a literal interpretation, since the principal linguistic versions of Art. 5(1)(b), first indent, of the Brussels I Regulation utilise expressions that only refer to tangible assets (“merchandises”, “goods” and “mercaderias”). 84 The second argument relies on a systematic lato sensu interpretation of Art. 5(1)(b), first indent, of the Brussels I Regulation together with the Vienna Convention on the International Sale of Goods of 1980, whereby the latter does not encompass intangible assets. The third argument emphasises that “the criterion according to which” Art. 5(1)(b), first indent, “determines jurisdiction – i.e. the delivering of goods” can only apply “with respect to tangible assets”. 85 Finally, this opinion also relies, mutatis mutandis, on all the arguments that preclude considering licence agreements relating to IP rights as contracts for the provision of services pursuant to Art. 5(1)(b) of the Brussels I Regulation. In conclusion, licence agreements relating to IP rights structured as contracts for the sale of goods are also to be included under Art. 5(1)(a) of the Brussels I Regulation.

The third comment relates to the structure and effects of licensing agreements relating to IP rights, and particularly to the obligations that the parties can undertake when concluding them. In the Falco case, the first question that was referred to the ECJ by the Austrian Supreme Court emphasised that, in a licence agreement relating to IP rights, “the owner of an intellectual property right grants the other contracting party the right to use that right”. The Falco decision stated that, in a licence agreement relating to IP rights, “the licensor undertakes the obligation not to challenge the use of his licensed IP right by the licensee”. Indeed, in a copyright licence agreement, the licensor generally also undertakes other kinds of obligations. Thus, for instance, in a licence agreement on the reproduction and sale of copies of phonograms (which the contract in dispute probably was), the licensor usually also undertakes the obligation to deliver to the licensee the master

82 Ibidem.
83 See P. FRANZINA, “La giurisdizione”, op. cit., at 301, with further references. See also P. MANKOWSKI, “Article 5”, op. cit., at 126; P. SCHLOSSER, op. cit., at 56.
84 P. FRANZINA, “La giurisdizione”, op. cit., at 301.
85 Ibidem.
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